

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP157

Cir. Ct. No. 2008CF874

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH M. FIELDS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County:
GREGORY B. GILL, JR., Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve
Judge.

¶1 PER CURIAM. Joseph Fields appeals an order¹ denying his WIS. STAT. § 974.06 postconviction motion in which he alleged ineffective assistance of his trial and appellate² counsel. The circuit court denied the motion because Fields failed to call his trial counsel as a witness at the postconviction hearing.³ Fields contends it is the responsibility of the State and the court to secure the testimony of his trial counsel. We disagree.

¶2 In order to establish ineffective assistance of counsel, Fields must show both deficient performance and prejudice to his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel’s strategic choices made after thorough investigation of the law and facts are virtually unchallengeable. *Id.* at 690. The law presumes that counsel has rendered adequate assistance. *Id.* Therefore, a defendant alleging ineffective assistance of counsel must call his counsel as a witness at the postconviction hearing to overcome that presumption.

¹ The notice of appeal also purports to appeal the judgment of conviction. Because Fields’ motion was filed under WIS. STAT. § 974.06 rather than WIS. STAT. RULE 809.30, the judgment of conviction is not the subject of this appeal. All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² Fields faults his appellate counsel for failing to argue ineffective assistance of trial counsel and for failing to investigate “issues of insanity and incompetency.” To the extent he challenges the effective assistance of his appellate counsel rather than his postconviction counsel, that claim can only be raised by a petition for a writ of habeas corpus in the court of appeals. *State v. Knight*, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). Appellate counsel can only raise issues that were properly preserved by postconviction counsel. To the extent Fields challenges the performance of postconviction counsel, that issue was properly raised by motion under WIS. STAT. § 974.06. *Rothering v. McCaughtry*, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996). However, because the issues regarding Fields’ mental state were not preserved by trial counsel, those issues would need to be raised under the rubric of ineffective assistance of trial counsel and would require Fields to call trial counsel as a witness at the postconviction hearing.

³ Judge James Bayorgeon presided at the postconviction hearing and issued an oral ruling denying Fields’ postconviction motion. The written order denying the motion was signed by Judge Gregory Gill.

State v. Machner, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Fields' failure to call his trial attorney as a witness precludes any finding of ineffective assistance of counsel.

¶3 Fields attempts to shift responsibility for calling his trial counsel as a witness to the State or the court. The burden of proving deficient performance and prejudice falls on the defendant. *State v. Sanchez*, 201 Wis. 2d 219, 232, 548 N.W.2d 69 (1996). Therefore, it was his obligation to subpoena his trial counsel and call him as a witness. Fields cites no authority for the proposition that the court or the State must make his case for him.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

